

NTSB Order No. EA-4225

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of July, 1994

Docket SE-12412

reduced to 60 days the Administrator's proposed 180-day suspension, a reduction the Administrator does not appeal. We deny respondent's appeal.

During the pertinent time in April 1991, respondent commuted to and from work using his Cessna 172. He would fly between a private airport at Lenora, GA (near his home) and Peachtree-DeKalb Airport (PDK), in Atlanta, GA, where he worked. His route would take him over Tucker, GA. Appeal at 4. Respondent does not contend that the area between the airports is not congested, as the term is used in § 91.119(b). Id. at 14. The issues before the law judge were, first, whether respondent flew his aircraft below 1000 feet, as prohibited in § 91.119(b) and, second, if so, whether such flight was permissible because it was necessary for takeoff or landing.

At the hearing, the Administrator introduced testimony of three witnesses. One, Mr. Bauer, who lived in Tucker, testified to having seen 7 of the 8 instances of alleged low flight.³ He
(..continued)

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

§ 91.13(a) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator was permitted to amend the complaint to, among other things, charge 8, rather than 7, flights. Tr. at 13.

testified that respondent overflew his house at altitudes (both descending and level) at various times of 100, 200-300, 300-350, and 500-600 feet AGL (i.e., above ground level). Two police officers testified to the eighth flight, during which, in a police helicopter, they followed respondent from the vicinity of PDK to his landing at Lenora. Both testified that his altitude ranged from 400 to 700 feet AGL. Respondent contended that Mr. Bauer was honestly mistaken and that the police officers lied in their altitude testimony.

On appeal, respondent first argues that he was taking off or landing at the time and that the Administrator has not established "what would constitute the proper altitude in the vicinity of the Bauer [house]." Appeal at 14. We disagree.

Mr. Bauer's house is approximately 5 miles from the runway. Assuming for the purposes of this discussion that respondent's altitude was as testified by Mr. Bauer and as found by the law judge, flights as low as many of respondent's were not necessary to takeoff or landing.⁴ We agree with respondent that the regulations offer some flexibility by providing the takeoff and landing exception. That exception must be applied reasonably, however. Even respondent testified that flying at 200-300 feet in the area of Mr. Bauer's house is not safe, and that he would expect to be at 1,000 feet at 5 miles out. Tr. at 331. At the

⁴The April 24 westbound flight, estimated by Mr. Bauer to be 500-600 feet when above his house, may present a harder question, but we need not decide whether 600 feet is also too low because the other, lower flights adequately support the charges.

lowest, he testified that he would be at 800 feet. Id. at 329.

He also repeatedly testified that he would not start to descend to PDK until approximately 4 miles from the airport (id. at 320, 330), thus supporting what we think, in any event, is a fairly obvious conclusion that the much lower altitudes at which he was sighted were unnecessarily low.

Respondent also challenges the law judge's acceptance of Mr. Bauer's and the police officers' testimony regarding his altitude, and suggests a number of reasons why we should reject that evidence. As the law judge noted, the altitudes reported by Mr. Bauer and the two police officers sharply conflicted with respondent's testimony that his cruise altitude was never below 1,000 feet AGL and that, in Mr. Bauer's area, he would be at 800 feet at the lowest.

The law judge was required to make credibility assessments, and made them in favor of the Administrator's witnesses. Resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there. Respondent argues that Mr. Bauer is mistaken and unreliable in his altitude estimates, but we are not convinced. He has considerable aviation experience that would assist him in his measurement. His obvious displeasure with low-flying aircraft and occasional hyperbole in expressing that displeasure to the authorities are not sufficient reasons to disregard his testimony. And, although respondent attempts to

impeach Mr. Bauer's credibility by citing his recitation of other aircraft operating extremely low, such occasions not only are possible, but were confirmed by the Administrator's controller witness. See Tr. at 291. We have carefully reviewed Mr. Bauer's testimony and despite some minor inconsistencies and unexplained idiosyncracies in his note-taking, those notes appear extremely reliable and we see no basis to overturn the law judge's reliance.⁵

Respondent's claim that the police officers lied is similarly unavailing, in our view. The law judge observed their demeanor, and considered respondent's grudge theory. It also is error to say, as respondent does, that the controllers stated that the aircraft was at 2,100 feet, thus ostensibly contradicting the officers' testimony. According to the record, however, a controller advised the police helicopter of traffic in the area shortly after respondent's takeoff, but at that point the controller's radar provided no altitude readout from the Cessna's transponder. The police answered, citing an altitude of 400 feet AGL for the nearby craft. Thereafter, although the radar indicated an altitude of 2,100 feet (1,100 feet AGL), the

⁵Thus, for example, we are not troubled by Mr. Bauer's change in the manner in which he identified the aircraft once he spoke to FAA Inspector Brantley and was told that the aircraft with the N number Mr. Bauer had seen was a Cessna 172 Skyhawk. Mr. Bauer's testimony and notes are quite specific in identifying a high wing, single engine, red-white-and-blue aircraft with respondent's N number. Respondent mistakenly argues that Mr. Bauer had referred to the aircraft as a low wing Beechcraft. Appeal at 17. Mr. Bauer's notes, until he corrected them, referred only to a Beechcraft, and he readily admitted at the hearing that he was unfamiliar with makes of aircraft.

testimony of the controller indicates that this readout could have been wrong, the result of faulty equipment in the aircraft. Tr. at 271-272.

Again, some part of the law judge's decision accepting the reports of the police officers is based on credibility assessments we are without sufficient reason to overturn.⁶ Moreover, even were this incident ignored, the law judge's 60-day suspension would continue to be well within the range of appropriate sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 60-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.⁷

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

⁶On appeal, respondent does not press the reasons offered at the hearing as to why one of the police officers was, in his opinion, lying about the incident. The law judge did not find them convincing, and we see no reason to differ.

⁷For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).